



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 20, 2004

Ms. Jennifer Riggs
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Austin, Texas 78701

OR2004-8942

Dear Ms. Riggs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 211344.

The Arlington Independent School District (the "district"), which you represent, received a request for ten categories of employee information, including lists of employees who have resigned and been rehired to the same position. You state that the district does not maintain the requested information in the form requested, but rather only within voluminous employment records. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.²

¹You failed to assert section 552.117 within the ten business day period mandated by section 552.301(a) of the Government Code. Because section 552.117 was not timely raised, the information subject to this exception is presumed public. Gov't Code § 552.302. In order to overcome this presumption, the district must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); see Open Records Decision No. 630 (1994). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law. See Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Section 552.117 is considered a compelling reason to withhold information, and therefore we will consider its applicability to the submitted information.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

As noted above, you state that the district does not maintain the requested information in the form of the lists requested. The Public Information Act (the "Act") does not generally require a governmental body to produce information in the format requested. *See AT&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex. App.—Eastland, pet. denied); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3, 342 at 3 (1982), 87 (1975). However, a governmental body has a duty to make a good faith effort to relate a request to information that it holds. *See* Open Records Decision No. 561 at 8 (1990). We find that the district has fulfilled this duty by gathering documents that contain information responsive to the request and submitting them to this office for review.

The district asserts that the requested information is excepted from disclosure in its entirety under section 552.103 of the Government Code. Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both elements of this test in order for information to be excepted from disclosure under section 552.103. *See id.*

In demonstrating that litigation is reasonably anticipated, the district must furnish concrete evidence that litigation is realistically contemplated and is more than mere conjecture. *See* Open Records Decision No. 518 at 5 (1989). Concrete evidence to support a claim that

litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ See Open Records Decision No. 555 (1990); see also Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). Conversely, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on case-by-case basis. See Open Records Decision No. 452 at 4 (1986).

You state that "the [requestor] is involved in pending administrative litigation against the [district]." However, the litigation was not pending on the date that the district received the request for information. Furthermore, you have not demonstrated that the district reasonably anticipated litigation with regard to this matter on the date that it received this request for information. Accordingly, we conclude that the district may not withhold any of the requested information under section 552.103 of the Government Code.

You claim that certain information within the submitted documents is excepted from disclosure under sections 552.101 and 552.102 based on the individual right to privacy. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101.⁴ See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

⁴Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

In Open Records Decision No. 455 (1987), this office concluded that each of the following categories of information has a direct bearing on an applicant's suitability for public employment and thus are *not* protected by either common-law or constitutional privacy: applicants' educational training; names and addresses of former employers; dates of employment; kind of work performed, salary, and reasons for leaving; names, occupations, addresses, and telephone numbers of character references; job performances or abilities; birth dates, height and weight, and marital status.

This office has found that the following types of information are excepted from required public disclosure under constitutional or common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992) (designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990), information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.,* Open Records Decision No. 600 (1992) (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure). Accordingly, we have marked personal financial information within the submitted documents which must be withheld under sections 552.101 and 552.102 in conjunction with common-law privacy. The remaining information is of legitimate concern to the public and is therefore not protected by privacy.

We next address your claim that some of the submitted information may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024.⁵ Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117 on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, to the extent that the employees in question made a timely election under section 552.024, the district must withhold the employees' home addresses and telephone numbers and social security numbers.⁶

Even if the employees did not timely elect to keep their social security numbers confidential, the social security numbers may also be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* Additionally, you contend that "[i]nformation about whether employees may or ha[ve] availed themselves of a benefit in connection with their social security account is a record related to a social security account number," and that such information is therefore confidential under section 405(c)(2)(C)(viii)(I). Section 405(c)(2)(C)(vii)(IV) of title 42 of the United States Code states that the term "related record" "means any record, list, or compilation that indicates, directly or indirectly, the *identity* of any individual with respect to whom a social security account number is maintained pursuant to this clause." 42 U.S.C. § 405(c)(2)(C)(vii)(IV) (emphasis added). Therefore, this provision prohibits the disclosure of social security numbers to the extent they are identifiable as the social security number of a particular person. *See* ORD 622 at 3, 4. While the social security number contained in an employee's personnel file is a "related record" under section 405(c)(2)(C)(vii)(IV), Open Records Decision No. 622 interprets the federal Social Security Act to require merely the redaction of the social security number, and not the withholding of the entire personnel record. *See* ORD 622 at 4. Accordingly, we disagree that the entire documents within group three are "related records" and find that only the social security numbers within these documents are subject to section 405(c)(2)(C)(viii)(I). However, we have no basis for concluding that the

⁵The former home addresses and telephone numbers of an employee of a governmental body who timely requests confidentiality under section 552.024 are also excepted from disclosure under section 552.117. *See* Open Records Decision No. 622 (1994).

⁶We note that you do not seek to withhold the social security number of the district employee who is represented by the requestor.

social security numbers in the submitted documents are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, you must withhold the information we have marked under sections 552.101 and 552.102 and common-law privacy. In addition, you must withhold current and former employees' home addresses and telephone numbers and social security numbers under section 552.117(a)(1), if the employees timely elected to keep this information confidential. Even if the employees did not make timely elections, their social security numbers may still be excepted under section 552.101 in conjunction with federal law. You must release all remaining information to the requestor.⁷

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

⁷Section 552.023 of the Government Code grants a special right of access to a person or a person's authorized representative to records that contain information relating to the person that is protected from public disclosure by laws intended to protect that person's privacy interests. In this instance, the requestor has a special right of access under section 552.023 to some of the submitted information. If the district receives another request for this same information from a different requestor, the district should resubmit the information to us and request another ruling. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 673 (2001).

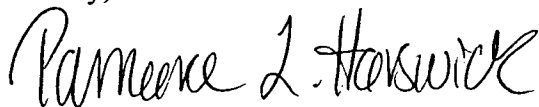
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

TLH/sdk

Ref: ID# 211344

Enc. Submitted documents

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